No. [redacted] 6

IN THE

Supreme Court of the United States

October Term, 1945

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioner

against

UNITED STATES OF AMERICA,

Respondent

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, on Reargument

JOSEPH O. CARSON
220 East Michigan Street
Indianapolis, Indiana

CHARLES H. TUTTLE
15 Broad Street
New York City, N. Y.

HUGH K. McKEVITT
1620 Russ Building
San Francisco, California

Attorneys for this Petitioner

[illegible] BAR PRESS INC., 47 WEST ST., NEW YORK [illegible]

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I

The Respondent's Concessions and their Vital Effect

A

The Respondent's brief on reargument concedes:

1. Section 6 of the Norris-LaGuardia Act applies to criminal prosecutions under the Sherman Act, including the present case (pp. 4, 6, 10).

2. In a criminal prosecution under the Sherman Act, growing out of a labor dispute, "Section 6 is in substance the proper criterion" (p. 8).

3. The words "association" and "organization" in Section 6 "apply to the petitioning labor unions" (p. 8).

4. The Senate Report, which recommended the Norris-LaGuardia Act for passage, when taken by itself, "might not be regarded as supporting the Government's present contention" (p. 21).

B

These concessions by the Respondent supplement the following concessions made by the Respondent in its former brief on the original argument in 1945:

1. The Trial Court ruled, in effect, that it is no defense that the agreements of 1936 and 1938 between the local unions and the local employers' associations were "entered into as an incident to a dispute between employers and employees concerning terms or conditions of employment", and that "the union group participated in the agreement for the purpose of promoting their own self-interest" (p. 21).

2. "It may be conceded that the validity of the convictions of the petitioners who stood trial must be tested upon the assumption that the agreement not to purchase low-cost and low-wage-scale millwork grew out of such a dispute" (p. 26).

3. "It is true that under the broad definition of parties to a labor dispute contained in Section 13 of the Norris-LaGuardia Act, the out-of-State producers of millwork would be parties to a labor dispute between the Bay Area manufacturers and their employees" (p. 28).

4. "It is also true that Section 20 (of the Clayton Act) immunizes 'ceasing to patronize' a party to a labor dispute or 'recommending, advising or persuading others * * * so to do'" (p. 28).

As to the significance of these four concessions we refer to the discussion thereof in our former Reply Brief submitted in 1945 (pp. 1-6).

C

The decisive effect of these concessions in the Respondent's present brief and in its former brief is clinched by the fact that the Trial Court never regarded the Norris-LaGuardia Act as having any application to the present case.

It ruled out evidence offered by the labor defendants which was vital to show the pendency of continuous labor disputes in 1936 and 1938 and thereafter between the labor defendants and their employers and between the labor defendants and rival union organizations, non-union employees and producers with inferior wage scales and working conditions both in and out of the State of California.

It refused all requests to charge, presented in multifold form, in the language and the substance of the various applicable sections of the Norris-LaGuardia Act.

It ruled and charged that the intent of the labor defendants to promote their own self-interest was not a defense and was not material or relevant as such.

It charged that the fact that the agreement closing the shop against millwork produced at an inferior wage scale or under inferior working conditions grew out of a labor dispute, was not a defense and was not material or relevant as such.

We refer to the description and analysis of these rulings, refusals and charges presented in Points II and III (pp. 22, 31) of our former Main Brief submitted in 1945.

D

The Respondent's present concessions, as well as those in its brief of 1945, are fatal to the theses of the Circuit Court of Appeals—evidently concurred in by the Trial Court—that the making of the agreements of 1933 and 1938 terminated the labor dispute and therefore terminated the labor immunities; that the Norris-LaGuardia Act thereupon ceased to be applicable; that the continuous controversies between these labor defendants and rival union organizations, non-union employees and producers with inferior wage scales and working conditions both in and out of the State were irrelevant; and that the intent of the labor defendants that such agreements should be defensive and offensive measures for their own protection and interest in those controversies was immaterial (1684-3).

See the discussion of this subject in Point II (p. 22) of our Main Brief in 1945, and in our Reply Brief (pp. 3-6) in 1945.

II

The very wording of Section 6 negatives and repudiates the present efforts of the Respondent to whittle down its meaning and to discriminate in its application.

(1) At pages 5, 6 and 7 of its brief the Respondent raises a question as to whether the Norris-LaGuardia Act "reaches the prosecution brought by the Government," where "the Government was not a party to that" labor dispute.

If there were such a question, then *United States* v. *Hutcheson*, 312 U. S. 219, and the many decisions of this Court following it rest upon unstable ground. That Act is a limitation upon the jurisdiction of the courts and

upon the nature of conduct by labor unions which can be regarded as a violation of any law of the United States, including the Anti-Trust Laws.

(2) On page 6 it is said that "Section 6 differs from the sections dealing with injunctions (principally Sections 4 and 7) in that the latter apply to 'cases involving or growing out of any labor dispute' whereas Section 6 in terms applies to an 'association or organization participating or interested in a labor dispute'."

We do not comprehend this attempt at distinction. Respondent has overlooked the definitions in Section 13 of the Act which by that Section are made applicable to all the other sections. By that Section a case involves or grows out of a labor dispute when it "involves any conflicting or competing interest in a 'labor dispute' (as defined in this section) of persons participating or interested therein (as defined in this section)." In other words, a case is of the character stated when the parties involved are of the character stated.

(3) At page 7 the Respondent claims that it is "arguable" that Section 6 "only applies to cases between the adverse parties to a labor dispute."

This contention is directly contrary to the Respondent's explicit concessions at pages 4, 6 and 10 that Section 6 applies to criminal prosecutions under the Sherman Act and to this very case.

(4) At page 20 the Respondent says:

> "The Norris-LaGuardia Act was not designed to free labor unions from liability for such conduct of their officers, but from liability for the acts of individual members in no way authorized to bind the union."

This is but one of many expressions in the Respondent's brief that Section 6 in terms and application draws

a distinction between a union's responsibility for the unlawful acts of its members and its responsibility for the unlawful acts of its officers.

In point of fact Section 6 does just the opposite. Its formula is single and uniform; and it determines the responsibility or liability of the union (or an officer or member thereof) "for the *unlawful* acts of" others, whether such others are "individual officers, members or agents." By the very terms of the Section, the test of a union's responsibility for the "unlawful acts" of others, whether such others are officers, members or agents, is one and the same, to wit, the union's actual participation in, or actual authorization and ratification of, such "unlawful acts."

Under that Section there is but one stated criterion for criminal responsibility or liability by the union. That uniform criterion does not vary according to the identity or capacity of the person who performs the "unlawful acts."

III

The Respondent fails in its inadmissible effort to escape the fact that Section 6 expressly and explicitly conditions the union's criminal liability upon actual participation in, or actual authorization or ratification of, the unlawful act itself.

Section 6 leaves no room for constructive, imputed or general responsibility for crime. It leaves no room for substituted formulations.

On the contrary, the Section declares in explicit, unambiguous and inescapable words that the union must be held to have no responsibility or liability for such "unlawful acts" unless on its part and according to clear proof there has been "actual participation in, or actual authorization of, *such acts*, or ratification of *such acts* after actual knowledge thereof."

In other words, in a criminal case the union can be held responsible criminally only if an actual *particeps criminis* in the unlawful act. The union must have actual complicity in the doing or ratification of the unlawful act itself. Its guilt must be personal to and by it.

The very terms of Section 6 negative the Respondent's present effort to rewrite the Section, to whittle down its meaning and application, and to substitute for its clear language such dubious and ambiguous phrases and standards as "implied authority", "scope of authority", "general principles of agency", and acts which the agent has "assumed to do" while "performing duties delegated to him."

In short, Section 6 supplies its own standard, criterion and formula for use in its own limited subject-matter, to wit: "unlawful acts" by an officer, member or agent of a union and the possible consequence of criminal liability therefor by the union. As to that particular subject-matter and issue, Section 6 is complete and exclusive. It leaves no room for the substitution of some other standard, criterion or formula by the process of interpretation. When applicable, it controls the issue to which it is directed according to the formula which it itself expresses.

The labor unions were entitled to have that formula and the mandate of that Section given to the jury; and it was reversible error for the Trial Court to ignore them and to substitute some other formulation, alien to the language of the Section itself.

The unions and the jury were entitled to the genuine article, and should not have been given a substitute now laboriously and dubiously argued to have been "just as good."

Since the Respondent now rightly concedes that Section 6 *was* applicable, the concession proves that the act of the Trial Court in giving the jury a substitute was either judicial legislation or an erroneous ruling that the Section was not applicable.

The Respondent concedes that in criminal cases involving individuals, "the principal is only criminally liable for his own act and for those of his agent which he has expressly assisted or encouraged" (p. 26); but Respondent then argues that "a less stringent rule has been applied to corporations" (p. 26). But whether this is so or not, the fact is plain that Section 6 phrases no such distinction but rather makes applicable to individuals, corporations and unions alike its criterion for determining criminal responsibility for the unlawful acts of others. And the further fact is plain that the intent of the enactment as well as of its explicit phrasing was, as stated in the Senate Report, to eliminate criminal responsibility unless there was actual participation in or ratification of the unlawful act as such.

The Respondent cites (pp. 27, 28) the cases of *N. Y. Central R. R. Co.* v. *U. S.*, 212 U. S. 481, and *Eagan* v. *U. S.*, 137 F. (2d) 369, cert. denied 320 U. S. 788. Neither of these cases involved a labor issue or the Norris-LaGuardia Act. Their citing is unfortunate for the Respondent, for they illustrate the difficulties and dilemmas into which the Respondent gets by asking that the explicit formula in Section 6 be laid aside and that there be substituted what it calls "general principles of agency". Both those cases state that a corporation may be held responsible in tort for the acts of its agent in the course of his employment "although done wantonly or recklessly or against the express orders of the principal" (212 U. S. 481, 493; 137 F. (2d) 369, 379); but that statement is the very rule which every congressional spokesman for the Norris-LaGuardia Act expressly declared should not be applicable to labor unions acting in the course of a labor dispute and which Section 6 was designed to render thus inapplicable. See the remarks of the various Senators quoted by the Respondent (pp. 13-24) and the Respondent's quotation from the Senate Report (pp. 12, 13).

A final illustration of the difficulty in which the Respondent's effort at substitution involves itself, is

furnished by the instance of a strike which has been expressly authorized by the union and in which all its members are instructed and required by the union to participate. In the course of that strike, a certain member of the union, acting in furtherance of the success of the strike and for the benefit of the union, perpetrates an unlawful act. Such would be a clear case where an agent "has assumed to do" for his union principal an unlawful act "while performing duties actually delegated to him". Yet the Respondent would be the first to concede, if not claim, that in such case Section 6 of the Norris-LaGuardia Act immunized the union from either civil or criminal liability. How then can the Respondent claim that Section 6 would have a different or contrary application merely because such member performing such unlawful act happened also to be an officer of the union?

IV

The report of the Senate Committee in favor of the passage of the Norris-LaGuardia Act upholds our reading of Section 6. The Respondent reluctantly so concedes.

The Respondent's brief devotes much space to quotations of remarks by individual Senators. Those remarks did not have in focus the precise issue now before this Court. Moreover, personal remarks by individual Senators are not evidence of the intent of the Senate or of Congress.

On the other hand, the report of a congressional committee introducing and sponsoring a particular bill for enactment in the form and phraseology recommended by such committee, furnishes some legitimate evidence as to the intent of the legislation.

Such is the Report of the Senate Committee on the Judiciary (drawn by Senator Norris) in its sectional

analysis of Section 6 (Report No. 163, Cal. No. 176, 72d Congress, 1st Session, Feb. 4, 1932, p. 19). At pages 12 and 13 of our Main Brief on this reargument, we have quoted at length from that Report's analysis of Section 6. For emphasis we now repeat the following therefrom:

> "It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or persons. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it."

And later in the same Report there is this statement concerning Section 6 (p. 20):

> "It is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts."

These quotations demonstrate why, in its present brief, the Respondent feels called upon to concede (p. 21):

> "This report by itself is not too clear on the point here in question, and, if that were all there were, might not be regarded as supporting the Government's present contention."

Unfortunately, the Respondent's brief, in quoting (pp. 20-21) what it characterizes as "the pertinent portion of the Senate Report" concerning this Section 6, omits the Report's decisive portions which we have quoted above.

There was nothing in the House Report, favoring the enactment of this legislation, which conflicts with what was thus said in the Senate Report concerning the application of Section 6 in criminal cases. Concerning Section 6, the House Report consisted only of three sentences containing merely generalized language. (Report No. 669, 72d Cong., 1st Sess., p. 9.)

V

As to this petitioner's criminal responsibility, the Trial Court not only refused all our requests based upon Section 6, but rejected the formula and criterion declared and made mandatory by that Section in such a case as this.

The Trial Court charged the jury that the guilt or innocence of the labor unions was to be determined "in the same manner as you determine that of the corporations, that is, *by an examination of the acts of their agents*" (1138).

This test, particularly when applied to a criminal case such as this, is contrary to and reverses the test prescribed in Section 6 which declares as the criterion, not an examination of the act of the agent (otherwise than to determine its unlawfulness), but *an examination of the act of the union itself*. In other words, the charge completely reversed the perspective and approach dictated by Section 6.

The Trial Court then continued with and emphasized its reversal of the true perspective and content of Section 6 by further charging that the "act of an agent" done for or on behalf of a union and within the scope of his authority, "or an act which an agent has assumed to do" for a union while performing duties actually delegated to him, is deemed to be the act of the union (1137-8).

Thus, for a second time the Trial Court charged the jury to determine the criminal liability of this petitioner according to what the agent did or "assumed" to do and not according to the actual participation of the union in the doing of such act.

Hence, here was imputed criminality at its baldest. The jury was told that the criminal act which the agent "assumed to do" must be "*deemed*" to be the criminal act of the union itself.

These charges to the jury by the Trial Court show, on their face and conclusively, that the Trial Court did not regard Section 6 as applicable to any factual or legal issue before the jury concerning this petitioner, and did not intend to follow or give to the jury the formula and criterion which it expressed.

As a result, the Trial Court made decisive altogether different action by the agent and altogether different action by the union than does Section 6, and declared that the criminality of the union must be "deemed" the consequence of the act of the agent rather than the consequence of the act of the union itself.

If, as is now conceded, Section 6 *was* applicable, why was not this petitioner entitled to have the jury given its formula and told of its mandate?

VI

The general and conventional charge on the subject of reasonable doubt did not cure the basic error of the Trial Court in refusing to place before the jury the formula and criterion expressed in Section 6.

Since the substantive requirements of Section 6 as conditions of criminal responsibility on the part of this petitioner were not followed by the Trial Court in its charge, this reversible error cannot be cured by any charge (even if there clearly was one) that other requirements must be proved beyond a reasonable doubt.

VII

The fact that as to individual defendants (not corporations or unions), the Court made a passing and wholly insufficient reference to "conscious participation in the alleged unlawful acts", merely emphasized and enhanced the error of the Court in refusing and rejecting, as to this petitioner, the formula and criterion prescribed in Section 6.

At pages 42 and 43, Respondent's brief admits that the Court rejected Requested Instruction No. 58 (1174) which asked a charge in the language of Section 6 with respect to the individual labor defendants.

Respondent seeks to mitigate this error by saying that the charge contained "a general provision" that as to an individual defendant (other than a corporation and union) there should be consideration "of the evidence as it relates to his conscious participation in the alleged unlawful acts" (1153); and Respondent then says (p. 43):

> "The only qualification as to this requirement of 'conscious participation' was contained in the charge previously considered relating to corporations and labor organizations."

Yet Section 6 makes no distinction on the issue of criminal responsibility between individuals and unions. In both cases, there must be actual and knowing participation in the unlawful act itself. Hence, what the Respondent refers to as the Trial Court's "qualification" in the case of the defendant unions of its charge as to the defendant individuals merely added to the basic error and to the hopeless confusion which must have existed in the jury's mind and which was enhanced by the refusal of the Trial Court to follow and give to the jury the formula and criterion in Section 6 either in the case of the individuals or in the case of the unions.

VIII

In any event, the charge as to this petitioner's criminal responsibility was ambiguous, inadequate and misleading, and hence must result in a reversal.

In the very recent case of *M. Kraus & Bros., Inc.* v. *United States*, decided by the Supreme Court of the United States on March 25, 1946, this Court said (slip opinion, p. 9):

> "'A conviction ought not to rest upon an equivocal direction to the jury on a basic issue. *Bollenbach* v. *United States*, —— U. S. —— (slip opinion, p. 5)'."

The Requests for Instructions as presented by this petitioner and the local labor unions were clear, definite and accurate. In order that there could be no possible criticism of their phraseology, they reproduced the language and alternatively the substance of Section 6. Since, as is now conceded, Section 6 *was* applicable and controlling on the issue of the criminal responsibility of the unions, there can be no lawful or justifiable reason for the total rejection of those requests and for the substitution of other and wholly different phraseologies and formulations. (See the rejected Requests and the substituted Instructions, Rec. 1172-5, 1137-8.)

The defendant unions and the jury were entitled to have the formulation in Section 6 out in the open. The action of the Trial Court in withholding it prevents any one from now knowing whether the jury found in accordance with the stated conditions of that Section or would have rendered the same verdict had those stated conditions been revealed to them.

The Respondent's brief devotes some 30 pages to an involved, difficult and speculative argument that the altogether different and far more fluid formulation by the Trial Court was really the equivalent of the clear and

concise formulation in Section 6. But even that labored argument does not venture to explain why the Trial Court thus went around "Robin Hood's Barn" if it itself thought that there was equivalency; and the Respondent does not venture the impossible assertion that the jury realized the alleged equivalency and found in accordance with the language of Section 6.

Juries are not to be instructed on basic issues and principles by equivocal language or by mere implication. Where a fundamental proposition of law is correctly requested by the accused, the refusal to charge it is error. (*Bird* v. *U. S.*, 180 U. S. 357, 362; *Hersh* v. *U. S.*, 68 F. (2d) 799, 807.)

IX

Certain erroneous statements in Respondent's brief

1. At page 37 the Respondent's brief says:

> "Petitioners' briefs do not seem to object specifically to the first expression (in the Trial Court's charge)—'the act of an agent done for or on behalf of a corporation and within the scope of his authority'."

This statement is a complete mistake. Both by our requests to charge and by our exceptions to the charge, we asked for an altogether different formula and criterion. Our reasons for doing so are fully set forth above.

2. At page 41 the Respondent's brief says:

> "Petitioners asked for instructions stressing the necessity for authorization by the unions of the acts of their agents and such instructions were given."

This also is a complete mistake. Not a single request for instructions presented by the labor unions on this subject was granted or adopted by the Trial Court.

X

The evidence as to this petitioner, the United Brotherhood

At pages 45-48 the Respondent's brief discusses the evidence as to this petitioner. In view of our own somewhat extended discussion of this subject in our Main Brief on reargument (pp. 25-51), we shall not present any extended rejoinder here.

We believe that we have demonstrated that, as to the United Brotherhood, there should be a dismissal of the indictment, or at least a new trial, for lack of any clear proof of actual complicity on its part as required by Section 6. We also believe that our aforesaid discussion of the evidence as to this petitioner demonstrates that the rulings of the Trial Court concerning this petitioner in rejecting evidence, in refusing requests to charge, and in making certain charges were highly and decisively prejudicial.

We again submit that the ruling of this Court in the *civil* action entitled *Coronado Co.* v. *United Mine Workers*, 268 U. S. 295, is an authority *a fortiori* that the present indictment should be dismissed as to this petitioner. See our discussion of that case at pages 17-19 of our Main Brief on reargument.

Concerning that decision the Respondent's brief now says (p. 31):

> "We recognize that in the *Coronado* cases the International Union was held not responsible for the conduct of its president or the local organizations.

But the general provisions of the constitution of the International Union of United Mine Workers involved in that case were similar to those in the present case, particularly with reference to the general supervisory power of the president; and the alleged wrongful acts of the

president of that International Union were done for its benefit and in his capacity as president. They were certainly more extended than any conduct of the president of this petitioner herein. Yet, notwithstanding that that case was merely a civil one, this Court held that the evidence did not sufficiently "establish the participation of the International" (p. 301).

We summarize our rejoinder on the subject of the evidence as follows:

1. As to the approval by this petitioner's First Vice President of the by-laws of The Bay Counties District Council, see page 49 of our Main Brief on reargument.

2. As to the act of the First Vice President in issuing permits for the union label after the filing in his office of the contracts of 1936 and 1938, see page 38 of our Main Brief on reargument.

3. As to the amendment made in the contract of 1938 at the insistence of the president of this petitioner, see pages 32, 40-41 of our Main Brief on reargument.

4. As to the part which the president of this petitioner had in the incident of the Pacific Manufacturing Company, see page 34 of our Main Brief on reargument.

5. As to the so-called McCreedy correspondence, see page 44 of our Main Brief on reargument.

It is significant that while the grand jury indicted this petitioner, it indicted none of its officers.

Dated, April 18, 1946.

Respectfully submitted,

JOSEPH O. CARSON,
CHARLES H. TUTTLE,
HUGH K. MCKEVITT,
Attorneys for this Petitioner.